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No. 05-824

In The

Supreme Court of the United States

JOSEPH E. NAPIER,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Confrontation Clause permits the admission against a criminal defendant of a letter of certification and a breath test evidence ticket without the opportunity for cross-examination.

II. Whether Indiana's procedure for the prosecution of drivers suspected to be over the legal alcohol limit, which fails to provide for a witness who may be cross-examined, is fundamentally at odds with the right of confrontation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph E. Napier petitions for a writ of certiorari to review the rehearing decision of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The original opinion of the Indiana Court of Appeals (Pet. App. 10a-24a) is published at *Napier v. State*, 820 N.E.2d 144 (Ind. Ct. App. 2005). The opinion upon rehearing (Pet. App. 1a-9a) is published at *Napier v. State*, 827 N.E.2d 565 (Ind. Ct. App. 2005). The Indiana Supreme Court denied discretionary review without opinion (Pet. App. 25a-26a).

JURISDICTION

The Indiana Court of Appeals issued its decision on rehearing on May 17, 2005. The Indiana Supreme Court denied discretionary review on July 26, 2005. On September 27, 2005, the petitioner filed his Application For Extension Of Time To File Petition For Writ Of Certiorari, which Justice John Paul Stevens granted on October 06, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "In all criminal

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Napier was convicted of operating "a vehicle with an alcohol concentration equivalent of at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (0.15) gram of alcohol . . . per two hundred ten (210) liters of the person's breath."[1] This is a so-called *per se* offense, meaning proof alone of an illegal alcohol level at the time of driving is sufficient to convict an accused.

The case raises a Confrontation Clause issue which has divided state courts. It presents this Court with the opportunity to further define the meaning of "testimonial" within the context of the *Crawford* decision as it may apply to evidentiary certificates used in the prosecution of intoxicated driving offenses. It asks the Court to determine whether a breath test evidence ticket may be admitted against a criminal defendant pursuant to a state hearsay evidence exception without a witness subject to cross-examination. The case tests whether Indiana's procedure permitting the prosecution of drivers for the *per se* offense using documentary evidence and evidentiary presumptions, and failing to provide for a witness who may be cross-examined, is fundamentally at odds with the right of confrontation.

1. In this case the trial court admitted a letter of certification sent to the clerk of the circuit court in Morgan

[1] Ind. Code § 9-30-5-1(a).

County, Indiana, where the breath test machine at issue was used, reporting an inspection of the machine occurred on "8/13/2003," and that the machine "is in good operating condition, satisfying the accuracy requirements set out by State Department of Toxicology Regulations."[2] In Indiana this certificate is admitted by statute in a prosecution for an operating while intoxicated offense, and:

> Constitute[s] prima facie evidence that the equipment or chemical: (A) Was inspected and approved by the department of toxicology on the date specified on the certificate copy; and, (B) Was in proper working condition on the date the breath test was administered if the date of approval is not

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[2] To: Clerk, Circuit Court Morgan County

From: State Department of Toxicology

Date: August, 2003

Re: CERTIFICATE OF INSPECTION AND COMPLIANCE OF BREATH TEST INSTRUMENTS FOR USE PURSUANT TO THE INDIANA LAW FOR IMPLIED CONSENT TO TEST FOR INTOXICATION.

Pursuant to the authority granted by IC 9-30-6-5 (1991), and the Regulations promulgated thereto, 260 IAC 1.1, inspection and tests of the following instrument were conducted on the date shown below, the results of which are hereby certified, to-wit:

The instrument is in good operating condition, satisfying the accuracy requirements set out by State Department of Toxicology Regulations.

[8/13/2003 Inst. # 960130 Mooresville PD 104 W. Main St.]

/s/ Peter F. Method, Ph.D

Director, State Department of Toxicology.

* * *

The original Letter of Certification, issued by the State Department of Toxicology, must be kept on file in the office of the clerk of the Circuit Court and may be duplicated as needed for use in Court. [Original emphasis.]

> more than one hundred eighty (180) days before the date of the breath test; . . .[3]

The letter of certification is not the record of inspection compiled by an inspector charged with the duty to inspect; rather, it is a letter stating the inspection occurred, and that the writer has determined the machine met the requirements for certification. The official issuing the letter is charged with the duty to make that determination, although he did not perform the inspection, and to issue the *original* letter to the county court clerk where the machine is located so that it "may be duplicated as needed for use in court." *See* fn. 2. The letter serves as a foundation document for the admissibility of a breath test. The letter of certification does not include the records of the actual inspection, nor does it purport to certify the inspection records as true and accurate. The letter does not disclose the grounds upon which the director of the department of toxicology relied for his certification, but states his finding that the machine is in good operating condition, and that it satisfies Indiana's regulatory requirements for testing.

As is normal in Indiana, the admission of this letter of certification occurred without a witness who could be cross-examined regarding the inspection which was made, the findings of the declarant, or how well those findings presage the operating condition of the machine at the time of Napier's test. It was at this stage of the proceeding that Napier first objected on confrontation grounds based upon this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

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[3] Ind. Code § 9-30-6-5(c)(1) and (2).

By statute, the admission of this letter of certification established *prima facie* evidence the machine was in good working order at the time of Napier's test on November 12, 2003, within one-hundred eighty (180) days of the inspection. Napier challenged his inability to cross-examine a knowledgeable witness in his trial as to inspection, calibration, machine set-up, and whether the machine was in good working order at the time of his breath test. Napier asserted that the use to which the letter of certification is put in Indiana goes far beyond merely recording that a required inspection was performed. It is testimonial as to its declarations, and it is given a testimonial purpose, to provide *prima facie* evidence the machine was in good working order at the time of Napier's test.

2. The Indiana Court of Appeals began its decision on this issue by observing:

> This is a case of first impression, where we are called upon to decide the applicability of the rule set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), as it relates to the State's method of establishing a proper evidentiary foundation regarding the admissibility of various documents that are used to prove the results of a criminal defendant's breath test. Appellant-defendant Joseph E. Napier appeals his conviction for Operating a Vehicle With a BAC of .08 Percent Or More, [Footnote omitted] a class C misdemeanor, claiming that his conviction may not stand because admitting breath test results by certification documents and a BAC DataMaster Evidence Ticket (BAC ticket) violates the Confrontation Clause [Footnote omitted] of the United States Constitution.

Napier v. State, 820 N.E.2d 144, 145 (Ind. Ct. App. 2005) (App. 10a). The court agreed with Napier that:

> . . . Indiana Code section 9-30-6-5 permits the introduction of certificates of the director of the Department of Toxicology regarding the inspection and compliance issues. The result of such a process is that a breath test evidence ticket may be introduced against a defendant without the defendant's ability to question the reliability or accuracy of the methodology that is used to obtain such a result. (App. 15a).

The court also acknowledged:

> . . . the certificate of inspection and compliance is proffered, admitted, and treated as prima facie evidence not only as to what it states regarding inspection and compliance, but as to the inference to be given to it by the trial court that the machine was in working order at the time of the breath test. (App. 19a).

However, the court expressed the view that such "certifications are simply not included within the class of evidence that pertains to 'prior testimony . . .' identified by the *Crawford* court as the 'modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.'" The court continued:

> Even if it could be said that these types of certificates are akin to affidavits as Napier urges and, therefore, should be considered "testimonial" under *Crawford,* we do not see how the admission of these certificates would serve to preclude any meaningful cross-examination of the breath test evidence presented against him. Even though the inspector of the machine and the Director of Toxicology who executed the certification of inspection

> did not testify at trial, the information contained in the certificates does not pertain to the issue of guilt. Rather, that information simply goes to inspection and certification matters [citation omitted]. In our view, a defendant's inability to cross-examine that information which is contained in the certificates is not similar to the type of evidence that was of concern to the *Crawford* court. [*Id.*]

3. Napier also took issue below with the admission of the "BAC DataMaster Evidence Ticket," reporting his test at .14 grams per 210 liters of his breath on November 12, 2003,[4] under a procedure which denied him the right of confrontation. Under Indiana law the ticket is admitted based upon the letter of certification so long as the machine was inspected within 180 days, the test operator was trained, and the test operator used the proper technique in giving the test.[5] *See also State v. Johanson*, 695 N.E.2d 965, 966-67 (Ind. Ct. App. 1998). Napier asserted that the evidence ticket is a declaration of his purported breath alcohol at the time of the test, created for purposes of his prosecution, about which he had no opportunity to cross-examine a knowledgeable witness on issues pertaining to his guilt or innocence.

Because Napier's test was given within three hours of the time of driving, and was at least .08, admission of the breath test ticket into evidence gave the State a statutory,

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[4] State's Exhibit 4.

[5] Ind. Code § 9-30-6-5(d): "Results of chemical tests that involve an analysis of a person's breath are not admissible in a proceeding under this chapter . . . if: (1) The test operator; (2) The test equipment; . . . or (4) The techniques used in the test; have not been approved in accordance with the rules adopted under subsection (a)."

rebuttable presumption that his breath alcohol level was at least .08 at the time of driving.[6] Proof of the illegal alcohol level at the time of driving is an essential element of the *per se* BAC offense in Indiana. *Smith v. State*, 502 N.E.2d 122, 127 n.5 (Ind. Ct. App. 1986), *reh'g denied, transfer denied*. Because this element of the offense was satisfied by presumption without the State's having to call a witness, Napier argued he was denied his ability to cross-examine the "evidence" supporting the essential element of the offense against him.

Napier stipulated to foundational matters not at issue in the case: that the officer had cause to stop him, probable cause to offer him a breath test, was qualified to give the test, and followed the required steps in doing so. The State did not call a witness to testify in the trial, so Napier was unable to cross-examine any of the evidence entered or presumed against him as to issues pertaining to weight.

4. The Indiana Court of Appeals initially ruled:

> . . . the State, in this case, offered the DataMaster "evidence ticket" into evidence displaying the breath test results, absent any witness to present

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[6] Ind. Code § 9-30-6-15(b): "If, in a prosecution for an offense under IC 9-30-5, evidence establishes that: (1) a chemical test was performed on a test sample taken from the person charged with the offense within the period allowed for testing under section 2 of this chapter [three hours]; and (2) the person charged with the offense had an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per: . . . (B) two hundred ten (210) liters of the person's breath; the trier of fact shall presume that the person charged with the offense had an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per . . . two hundred ten (210) liters of the person's breath at the time the person operated the vehicle. However, this presumption is rebuttable."

> that exhibit. Hence, Napier was *not only precluded* from conducting any cross-examination with respect to the breath test operator's qualifications [which were stipulated], *he was not afforded the opportunity to question or attack the purported results of his breath test. Without that "live" testimony, Napier could not challenge those results. And the ability to challenge the breath test results directly pertains to the issue of guilt or innocence in this case.* (App. 23a) (emphases added).

The court, however, then concluded:

> . . . we are of the view that the State's manner of proving Napier's breath test results failed because the State failed to lay an adequate evidentiary foundation for their admission into evidence. We must conclude, therefore, that the State's failure to present any "live testimony" at trial from the officer who conducted the tests runs afoul of the Confrontation Clause of the Sixth Amendment to the United States Constitution in light of *Crawford*. That is, the State failed to establish an adequate evidentiary foundation for the admission of the test results into evidence. Hence, we find that the trial court abused its discretion in admitting Napier's breath test results into evidence, and his conviction is reversed on this basis. [*Id.*] (App. 23a).

With this final paragraph, the court shifted the fulcrum of its ruling from Napier's inability to challenge the breath test results through cross-examination to his inability to question the officer upon foundational issues related to his training, a matter to which Napier had stipulated at trial. The stage was set for rehearing.

5. In its opinion on rehearing, based upon Napier's trial stipulation of the officer's training, the court receded from the holding that the State had failed to establish an adequate foundation for the admissibility of the breath test when it did not call the test operator. Napier's conviction was reinstated. *Napier v. State*, 827 N.E.2d 565, 567 (Ind. Ct. App. 2005), *transfer denied* (2005) (App. 1a). The court précised Napier's arguments on rehearing as follows:

> In sum, Napier urges on rehearing that we erred in determining that his inability to question a witness regarding the reliability or accuracy of the test machine does not violate the Confrontation Clause pursuant to *Crawford*. To be sure, Napier contends that the determination of reliability of the evidence is placed into the hands of the department of toxicology, and grants the prosecutor a presumption that the determination made by the toxicology departments [sic] is reliable. Hence, such a procedure fails to provide for a witness who may be cross-examined about the reliability determination reflected in the certification, the accuracy of a particular test, or the presumptions applied to such evidence. Therefore, Napier contends that this procedure is fundamentally at odds with the right of confrontation. [*Id.*] (App. 4a-5a).

The court reaffirmed its opinion that the certificates of the department of toxicology "are not testimonial in nature, thus do not fall within the rule announced by *Crawford*." (App. 7a). Its response to Napier's arguments on rehearing, summarized above, was that a statute permitted the admission of the test results, and it would be "unreasonable . . . to have a toxicologist [the department uses trained inspectors] in every court on a daily basis offering testimony about his inspection of the breathalyzer machine. . . ." (App. 9a).

Rubbing salt in Napier's wound, the court speculated in *obiter dictum* that in lieu of the test operator, the State might just introduce a video or a checklist to show the test was properly conducted. *Id.*

6. Petitioner timely sought transfer of this decision, but the Indiana Supreme Court denied discretionary review without opinion. Leave was granted to extend the time for filing Napier's Petition for Writ of Certiorari to the 23rd day of December, 2005.

REASONS FOR GRANTING THE WRIT

1. Following this Court's recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004), state courts, including states' highest courts, have become divided on the issue of whether evidentiary certificates and breath test results may be admitted against a criminal defendant without providing the accused the opportunity to test the evidence in the "crucible of cross-examination." Some courts, including the Indiana Court of Appeals, have simply treated such evidence as non-testimonial, or statutorily permitted, avoiding the confrontation issue altogether. Other courts have applied the *Crawford* holding as Napier believes it was intended, and have required that witnesses accompany the documentary evidence offered, so that when it is admitted it may be tested by cross-examination. This case reflects a clear and important conflict in the courts which affects perhaps the most frequently prosecuted offense in the United States – involving all segments of the population – and it results in an inconsistent application of the Confrontation Clause, leading to necessarily inconsistent resolutions. This issue can only be finally resolved by this

Court. It provides a signal opportunity for the Court to further define the meaning of "testimonial," and the protections afforded by the Confrontation Clause under *Crawford v. Washington*.

2. The Indiana Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Court. The court held that under Indiana's statutory procedure for prosecuting drinking drivers, the Confrontation Clause only requires that live testimony be presented to satisfy the foundation for admissibility of a breath test result in a *per se* prosecution, unless the foundation is stipulated or otherwise proved. In this case the court allowed the State of Indiana a conviction in a trial where it did not call a witness, under a statutory procedure which fails to provide for a witness who may be cross-examined on issues ultimately pertaining to guilt or innocence. This decision is fundamentally at odds with the right of confrontation, and conflicts with the determination in *Crawford* that the goal of the Confrontation Clause is a procedural guarantee that the reliability of evidence be "assessed in a particular manner: by testing in the crucible of cross-examination."

I. LOWER COURTS ARE IRRECONCILABLY DIVIDED OVER WHETHER EVIDENCE CERTIFICATES AND BREATH TEST RESULTS MAY BE USED IN THE PROSECUTION OF DUI CASES WITHOUT PROVIDING CROSS-EXAMINATION.

A. Several State Courts, Including Some of the States' Highest Courts, Are Divided on this Issue.

Prior to this Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004), several states had already held

that statutes which permit the admissibility of evidence certificates without presenting the certificate's author violate the Confrontation Clause: *People v. McClanahan*, 729 N.E.2d 470 (Il. 2000) (statute allowing lab reports in lieu of actual testimony as *prima facie* evidence of contents of substance at issue in drug prosecutions fails to satisfy requirements of federal confrontation clause); *Miller v. State*, 472 S.E.2d 74 (Ga. 1996) (confrontation clause barred admission pursuant to statute of certificate containing result of forensic testing without a preliminary showing of reliability or determination whether hearsay declarant was unavailable to testify); *Barnette v. State*, 481 So. 2d 788 (Miss. 1985) (statute allowing state to establish essential element of criminal offense solely by a certificate of analysis impermissibly lessened the state's burden and denied the defendant the constitutionally guaranteed right to confront and cross-examine witnesses against him).

Since *Crawford*, several courts have applied its holding to limit their state's ability to admit certificates and test evidence without corresponding witnesses available for cross-examination. In *Shiver v. Florida*, 900 So. 2d 615 (Fla. Dist. Ct. App. 2005) the court held that a breath test affidavit containing statements one would reasonably expect to be used prosecutorially, made under circumstances which would lead an objective witness to reasonably believe the statements would be available for trial, was testimonial. Some of the information in the affidavit was within the trooper's knowledge, but otherwise he "was simply attesting to someone else's assertion that the breathalyzer had been timely and properly maintained before being used on Appellant." *Id.* at 618. Even though the trooper testified and was cross-examined, the court

found he could not be examined on the matters of which he had no knowledge. *Id.*

The case of *Belvin v. Florida*, ___ So. 3d ___, 2005 WL 1336497 (Fla. Dist. Ct. App. 2005) dealt with a fact situation similar to Indiana's. A breath test was given, and an affidavit signed attesting to the results of the test in a DUI prosecution. A Florida statute permitted admissibility of this affidavit, and established it as presumptive proof of the results. Unlike Indiana, Florida law provided the defense the opportunity to subpoena the test operator as an adverse witness. In holding that the admission violated Belvin's right of confrontation, the court found: "Here, it is undisputed that the sole purpose of the breath test affidavit generated by law enforcement is for use at a DUI trial. A breath test affidavit thus appears to fall squarely within *Crawford's* 'core class of "testimonial" statements.'" (Page 3.)

In *City of Las Vegas v. Walsh*, 91 P.3d 591, *modified* 100 P.3d 658 (Nev. 2004) (modified to amplify fn. 25.) Nevada's highest court ruled that a health professional's affidavit made pursuant to statute was prepared solely for the prosecution's use at trial, and was offered to prove certain facts concerning the presence of alcohol. Based on *Crawford* the court ruled the document inadmissible without a showing that the affiant is unavailable and the accused had a prior opportunity to cross-examine the affiant on the statements in the affidavit. 91 P.3d at 595.

Other courts have reached parallel conclusions in non-DUI criminal cases. In *People v. Rogers*, 8 A.D.3d 888 (N.Y. App. Div. 2004) admission of the blood test result of a rape victim, requested and prepared for law enforcement by a private lab, and admitted against Rogers without his

ability to cross-examine the report's preparer, was a violation of his rights under Confrontation Clause. *See also, Commonwealth v. Carter*, 861 A.2d 957, 969 (Pa. Super. Ct. 2004) (decided on hearsay and confrontation grounds without reference to *Crawford*, determining a lab report for the presence of cocaine prepared by a police lab for use in prosecution could not simply be read into evidence by a witness who did not prepare the report); and, *Johnson v. State*, ___ So. 2d ___, 2005 WL 2138714 (Fla. Dist. Ct. App. Sept 7, 2005) (police lab results in cocaine and marijuana tests ruled inadmissible testimonial hearsay, and the State's witness was not unavailable for confrontation purposes.)

The decision of the Montana Supreme Court in *State v. Carter*, 114 P.3d 1001 (Mt. 2005) actually broke both ways. It held machine certifications are non-testimonial hearsay under *Crawford*, but it distinguished the certifications in *Carter* from the chemical analysis decision it reached in *State v. Clark*, 964 P.2d 766 (Mt. 2005). *Clark* held that an actual chemical analysis was a critical part of the substantive evidence offered by the prosecution to prove that the defendant had committed a drug offense, and its admission without the testimony of the compiler violated Clark's right to confrontation. *Carter*, at 1006-07.

Several other courts have fashioned a narrower application of what is "testimonial" under *Crawford*, concluding that unless the evidence is prior testimony at a preliminary hearing, before a grand jury, at a former trial, or elicited during a police interrogation, it is not testimonial. *People v. Hinojas-Mendoza*, 2005 WL 2561391 (Colo. Ct. App. 2005) (drug certificates are not testimonial); *Moreno Denoso v. State*, 156 S.W.3d 166 (Tex. App. 2005) (holding autopsy reports are not testimonial); *State v.*

Dedman, 102 P.2d 628 (N.M. 2004) (report of blood alcohol content not testimonial); *Luginbyle v. Commonwealth*, 618 S.E.2d 347 (Va. App. 2005) (technician's certificate of calibration and the report from a breathalyzer machine were admissible business records); *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (Drug certificates of analysis fell within the public records exception, akin to a business or official record, were admissible without the testimony of the chemist who analyzed the substances and prepared the certificates, and did not violate the Confrontation Clause.)

B. The Letter of Certification in Petitioner's Case was Testimonial, and Was Prepared by a Government Agent Solely For Use in Prosecutions.

Crawford describes a "core class of 'testimonial statements'" as including "affidavits," any "similar pretrial statements that declarants would reasonably expect to be used prosecutorially" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52. Professor John F. Yetter of Florida State University College of Law writes "[a]ffidavits and other documents prepared by and setting forth the assertions of state agents with the contemplation of later use in evidence would . . . seem to fall squarely within the concept of 'testimonial statements.'" *Wrestling With Crawford v. Washington and the New Constitutional Law of Confrontation*, 78 Fla. B.J. 26, 32 (October 2004).

The letter of certification in petitioner's case states that an inspection occurred. The letter says the state

official (who did not perform the inspection) has himself determined the machine is in good operating condition and that it satisfies State regulations. The declarant understands that his letter is formulated for use by the prosecution at trial, and that it will be *prima facie* evidence the machine was in good working order at the time of petitioner's test. It is clear on its face that the letter is prepared in anticipation of its use in court by the prosecution because the original is sent to the circuit court clerk in the county where the machine is used to be duplicated for use in court. The only use made of these certificates, by statute, is for the prosecution of offenses under 9-30-5 (DUI/OVWI), 9-30-9 (court deferred prosecution for alcohol offenses), or 9-30-15 (open container offenses). Ind. Code § 9-30-6-5(c)(1).

The Indiana letter of certification is a formalized, *ex parte* statement by a government agent created to be used as a substitute for a live witness. Were Napier able to test the machine inspection process in the "crucible of cross examination," he could have exposed weaknesses in Indiana's inspection and calibration procedure; he could have questioned subjective perceptions of the inspector, he could have determined how up to date the equipment was in terms of modifications; and he could have determined whether factory replacement parts have been used, or factory software modifications have been made. Another area of cross-examination relating to evidence encompassed by the letter of certification includes the breath temperature at which the machine is set to calibrate alcohol readings, as opposed to the average breath temperature of a normal human being, and the detriment arising therefrom in a large percentage of testing subjects. *See* D.A. Carpenter, J.M. Buttram, *Breath Temperature:*

An Alabama Perspective, 9 IACT Newsletter 16 (July 1998) (study in Alabama where the Draeger breath test machine reads the actual breath temperature of the subject, records it, and corrects for high alcohol readings due to breath temperatures higher than the machine's assumed setting. Corrected readings were found to occur in more than 80% of the tests reported in the study).

Other fruitful areas for cross-examination include whether the mouth alcohol detection process was tested, and in what manner; at what level the machine is set to detect an interfering substance during a breath test; whether the machine can detect interfering substances which can be read as ethanol (alcohol), but which are outside the range of the interferent filter the state uses; whether Indiana follows federal guidelines calling for at least two breath tests to read within .02 (it does not), and whether the BAC DataMaster machine could be set up to meet these guidelines and perform replicate tests (it can); whether a simulator solution could be run before an individual's test, as it is done in many states, so to prove the machine was still operating within calibration parameters at the time of the test (it can); and, whether against the recommendation of the manufacturer, the test machines are not calibrated in Indiana at the legal levels established by law (.08 and .15).

The use of this letter of certification for many years shielded the fact that for more than a decade Indiana toxicology inspectors were not required to preserve inspection tests showing machines had gone out of calibration during the period between inspections; therefore, such records were thrown away by all but one inspector, who kept a log of some of these occurrences with his machines. That practice, having come to light, has purportedly

ceased; however, it is indicative of abuses which may occur in the absence of the opportunity for meaningful cross-examination. Looking at the letters of certification in clerks' offices throughout the State during that period, for ten to fifteen years it would seem that no machine in Indiana ever went out of calibration between inspections.

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances. [*Crawford* at 56, fn.7.]

As a result of the practice referred to above, the current director of toxicology began an in-house study to determine the percentage of times the department's breath testing machines go out of calibration over the three to six month actual period between inspections. That information would be meaningful in cross-examination to assist a trier of fact to determine the weight to be given the *prima facie* evidence presumption that the machine remains in good working order for all tests conducted within one-hundred (180) days of inspection. Because this information is "in-house," it can only come from an examination of the author of the letter of certification, and many, if not most, persons accused of DUI offenses are unable to afford depositions or experts. Cross-examination is their only means to test the weight of the State's evidence.

A city court in New York wrote recently of the value of cross-examination within this context:

> The truth-seeking value of cross examination in this context (breath testing) is not merely theoretical. Substantial problems with DWI testing in this state were uncovered in the 1990's, and there have also been recent problems even with the reliability of the FBI laboratory analyses. Subjecting the persons who conduct these calibration tests to the crucible of cross-examination will help ensure the reliability of their work and protect the integrity of the judicial system by avoiding convictions based on faulty breath test results.

People v. Orpin, 8 Misc. 3d 768, 796 N.Y.S.2d 512, 517 (Irondequoit Town Court 2005).

Reviewing Napier's argument the letter is testimonial and should not have been admitted without his having the opportunity to subject the author to cross-examination, the court said:

> we do not see how the admission of these certificates would serve to preclude any meaningful cross-examination of the breath test evidence . . . Even though the Director of Toxicology who executed the certification of inspection did not testify at trial, the information contained in the certificates does not pertain to the issue of guilt.

Napier, 820 N.E.2d at 149 (App. 19a). The court does not acknowledge that the letter shields the department's calibration and inspection process from question or attack, and that the *prima facie* evidence it provides cannot be subjected to any form of cross-examination. The court likewise does not recognize that the inspection, maintenance, and calibration of purportedly scientific testing equipment has everything to do with the ultimate issue of whether the machine's test results are accurate; and, that

the accuracy of a test result has everything to do with the issue of guilt, when the offense is *per se* guilt based upon the result. It is not the place of the Indiana Court of Appeals to carve a "pertaining to guilt" exception into the Sixth Amendment. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirements to be developed by the courts." *Crawford* at 54.

If, as the court states, the admission of the certificate did not preclude Napier from "any meaningful cross-examination of the breath test evidence," from what source in his case could he have derived meaningful cross-examination? The inspector was not called to testify; the author of the letter was not called; and the police officer who gave the test was not called.

C. The Breath Test Evidence Ticket Should Not Have Been Admitted without the Opportunity for Cross-Examination.

After Napier had stipulated to preliminary matters which were not in dispute, the State elected not to call any witness when it offered the breath test result into evidence. The "BAC DataMaster Evidence Ticket" was entered bearing the signature of the breath test operator, who was the police officer who arrested Napier, and a test result: "Subject Sample .14 02:15." (States Exh. 4, App. 12a). Petitioner objected at trial and asserted on appeal that the admissibility of the breath test evidence ticket without a witness who could be subjected to meaningful cross-examination was a violation of the Confrontation Clause, and conflicted with this court's holding in *Crawford*.

It cannot be fairly disputed that the breath analysis of the operator was conducted solely to provide evidence in court to prove the facts necessary to convict Napier. It was prepared for use at trial by a government agent; it was a substitute for an actual witness; and it was admitted in evidence without the opportunity of cross-examination. In its initial holding, the court reversed Napier's conviction, seemingly because

> . . . he was not afforded the opportunity to question or attack the purported results of his breath test. . . . We must conclude, therefore, that the State's failure to present any live evidence at trial from the officer who conducted the tests runs afoul of the Confrontation Clause of the Sixth Amendment to the United States Constitution in light of *Crawford*.

820 N.E.2d at 151 (App. 24a).

On rehearing, the court found that in *Mullins v. State*, 646 N.E.2d 40 (Ind. 1995), "our supreme court held that Section 9-30-6-15(a)[7] creates, in fact, [a hearsay] exception, making breath-test results admissible in prosecutions under § 9-30-5." 827 N.E.2d at 568-69 (App. 7a). The *Napier* court did not attempt to place the breath test ticket into any Confrontation Clause exception recognized in *Crawford*. Rather, the court deferred judicial analysis and applied the legislature's pre-*Crawford* standard of blanket

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[7] At any proceeding concerning an offense under IC 9-30-5 or a violation under IC 9-30-15, evidence of the alcohol concentration that was in the blood of the person charged with the offense: (1) at the time of the alleged violation; or (2) within the time allowed for testing under section 2 [IC 9-30-6-2] of this chapter; as shown by an analysis of the person's breath, blood, urine, or other bodily substance is admissible.

admissibility so long as the letter of certification is admitted, the operator is qualified, and he or she followed approved techniques. *Id.*

A blanket rule for the admissibility of this kind of hearsay document, without an accused's being able to question or attack the results through cross-examination, cannot pass muster when "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Crawford*, 541 U.S. at 61. The procedure approved in *Napier* permits the trier of fact to be presented with evidence untested by the adversary process, based upon the judicial determination that the legislature said it was admissible. This holding is less tenable than the standard of judicial reliability established in *Ohio v. Roberts*, 448 U.S. 56 (1980), which this Court altered for confrontation purposes in *Crawford*.

In the last analysis, the Indiana Court of Appeals protected Napier's right of confrontation only as it related to the foundational questions of whether the officer giving the test was properly qualified, and whether he followed the procedures required to conduct a test. As this evidence presented no issue in Napier's defense, he stipulated the preliminary matters, and waited to cross-examine the State's witness on the important issues pertaining to the accuracy of his test, and whether the test result proved his alcohol level at the time he was stopped, the essential remaining element of the *per se* offense. The State called no witness.

D. This Case is an Excellent Vehicle for Considering the Way this Type of Evidence Should Be Addressed in the Context of the *Crawford* Decision.

The case presents two types of out-of-court hearsay declarations. The first is in the form of a letter of certification by a government official, purporting to be a foundational document reporting on the inspection and certification of a breath test machine. The document was prepared solely for use by prosecuting authorities. Its admission provides the trier of fact with *prima facie* evidence the machine was in good working order at the time of petitioner's breath test.

The second document is an evidence ticket admitted by the lower court through application of a statutory hearsay exception, also without the presence of a witness who might be cross-examined. In the case presented, proof of the illegal alcohol level stated in the evidence ticket created a rebuttable presumption that petitioner's alcohol level was illegal at the time of driving. This presumption completed the State's proof on the remaining essential element of the offense at issue.

As both types of documents were admitted without any opportunity for petitioner to cross-examine the evidence contained in them, or presumed from them, the confrontation issue is sharply delineated. The case represents the two types of documentary evidence presented in DUI cases throughout the country, over which several courts have divided; and it applied the most common evidentiary presumptions used in this kind of prosecution. A decision in this case would have applicability to a broad range of similar documentary evidence issues arising in

drug cases, DNA cases, cases involving autopsy reports, and in many other criminal cases.

The case comes to this Court on direct review, without issues pertaining to collateral relief, it was decided by the lower court without issues of waiver, and the error of the admission of the evidence, if any, cannot be harmless. It permits the Court to address two concerns it has acknowledged led the Framers to fashion the Sixth Amendment: (1) abuses by Congress and (2) the use of "written evidence" by the government. *Crawford*, at 49.

II. THE DECISION BELOW DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY WHICH REACHED AN INTOLERABLE RESULT, PERMITTING NAPIER'S CONVICTION WITHOUT PROVIDING FOR CONFRONTATION.

Indiana's procedure for the prosecution of drivers suspected to be over the legal alcohol limit, which fails to provide for a witness who may be cross-examined, is fundamentally at odds with the right of confrontation. The issue presented here is the sum of the parts discussed in the foregoing issues. Those issues, however, dealt with documentary evidence. They mentioned, but did not address, the denial of the right of confrontation embodied in the interplay of Indiana's special DUI statutes which carve out hearsay exceptions for documentary evidence, and which marry those exceptions to evidentiary presumptions that ultimately allowed Napier's conviction without a witness having been called to testify against him.

One rationale *Napier* gave for permitting such an intolerable process to continue, was that it would be "unreasonable . . . to have a toxicologist in every court on a

daily basis offering testimony. . . ." In a prescient moment thirty years ago one state court addressed this sort of argument. In *Lowery v. State*, 317 So. 2d 365, 369 (Ala. App. 1975) the court noted "the constitutional right of confrontation and cross-examination to the extent guaranteed by the Sixth and Fourteenth Amendments cannot be sidestepped because it happens to be convenient for one of the parties," quoting *Holman v. Washington*, 364 F.2d 618 (5th Cir. 1966). *Lowery* noted, "by use of certified copies of business documents and official records under special statutes providing for such, it could be conceivable that the State could prove some offenses without the necessity of calling any witnesses at all, except for the guarantees of our state and federal constitutions." *Id.* at 371.

I.C. § 9-30-6-5(c)(1) provides for the admissibility of the letters of certification. Once admitted, these become the locomotive which drives the government's case toward conviction. I.C. § 9-30-6-5(c)(2) provides that the letter of certification of the machine constitutes *prima facie* evidence the machine was in proper working condition on the day the breath test was administered. This "evidence" cannot be cross-examined without a knowledgeable witness giving testimony.

Upon admission of the certifications, I.C. § 9-30-6-15(a) requires the trial court to admit the breath test result. I.C. § 9-30-6-15(b) then creates a presumption that a breath test taken within three-hours of the time the accused operated the vehicle, accurately reflects the accused's BAC level at the time of the offense. This last presumption provides the "evidence" necessary to prove the essential element of the *per se* BAC offense for which Napier was convicted. It cannot be cross-examined without a knowledgeable witness giving testimony. [The scientific

validity of such a presumption has been called seriously into question. *See Mata v. State*, 46 S.W.3d 902, 908-909 (Tex. Crim. App. 2001).]

At the turn of the twentieth century a bill was placed in the Indiana legislature to change the value of *pi* in Indiana to 3.00. It is worthy to note that Indiana's legislature is notorious for the lengths to which it will go in almost any direction if left unchecked. It has fashioned the BAC DataMaster into the perfect conviction machine. Special statutes and State courts have insulated it from nearly any attack. It requires no witnesses, it cannot be cross-examined, it cannot be impeached, and the admission of its result alone sustains conviction for operating *per se*. The Court should reawaken the right of confrontation in these Indiana cases, and enforce its decision in *Crawford* against these special statutes permitting trial by document and presumption. The engine for truth has stalled in Indiana.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH E. NAPIER, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	)))))))	No. 55A01-0406-CR-237

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane Spencer Craney, Judge
Cause No. 55D03-0311-CM-330

May 17, 2005

OPINION – FOR PUBLICATION ON REHEARING

BAKER, Judge

Both the State and Napier have petitioned for rehearing in this case.[1] Napier was charged with, and convicted of, Operating a Vehicle with a BAC of .08 Percent or More, a class C misdemeanor. In this case of first impression, we were called upon to decide the applicability of the rule set forth in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), as it related to the State's method of establishing a proper evidentiary foundation regarding the admissibility of various documents that are used to prove a defendant's breath test results. *Napier v. State*, 820 N.E.2d 144, 145 (Ind. Ct. App. 2005).

In our original opinion, we decided that the State's failure to present any "live" testimony at trial from Officer Anderson – the police officer who performed the chemical breath tests on Napier – violated the Confrontation Clause[2] of the United States Constitution in light of *Crawford*, inasmuch as such evidence was not "testimonial" in nature. *Id.* at 151. To be sure, in *Crawford*, the United States Supreme Court held that testimonial statements of witnesses absent from trial are admissible over a confrontation clause objection only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. *See Crawford*, 124 S.Ct. at 1374.

We further concluded in *Napier* that the admission of the breath test instrument certification documents at issue did not violate the rule announced in *Crawford*. *Napier*, 820 N.E.2d at 149-50. However, we held that the

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[1] We heard oral argument on the parties' petitions for rehearing on March 29, 2005. We commend counsel for their able presentations.

[2] U.S. Const. Amend. VI.

admission of the BAC ticket into evidence that purportedly proved Napier's breath test results was improper because the absence of any "live" testimony failed to establish the necessary foundation for the ticket's admission. *Id.* at 146. Hence, we concluded that the trial court abused its discretion in admitting Napier's breath test results into evidence, and we reversed his conviction on that basis. *Id.* at 151.

DISCUSSION AND DECISION

I. Napier's Arguments

While Napier ultimately prevailed on appeal, he now petitions for rehearing, claiming that we misconstrued *Crawford* in determining that the admission of the certification documents in lieu of live testimony did not violate the Confrontation Clause. Napier also raises the issue of whether the hearsay breath test evidence ticket is admissible under our rules of evidence. Finally, he attacks our determination that his inability to cross-examine the evidence as presented did not violate the Confrontation Clause because the information contained in the certificate of inspection does not relate to the issue of guilt or innocence.

At the outset, we note that the parties have pointed out that Napier stipulated at trial that Officer Anderson was properly certified to perform Napier's breath test. Appellee's Br. on Rehearing, p. 2. To be sure, the nature of Napier's trial objections focused on the admission of certificates of inspection, the instrument certificates, and the printout indicating that Napier's breath contained .14 grams of alcohol per 210 liters of breath. Tr. p. 6, 19. So, as the State acknowledges in its petition for rehearing that

there was no argument as to Officer Anderson's qualifications or as to the manner in which he conducted the breath test, we now recede from our holding that this case must be reversed upon the theory that the State failed to lay a proper foundation for the admission of this evidence.

Turning to Napier's specific arguments on rehearing, he points out that Indiana Evidence Rule 702(b) provides that scientific expert testimony is admissible only when the court is satisfied that the scientific principles upon which the expert testimony rests are reliable. That is, once a trial court has determined that a particular scientific technique is capable of producing reliable results, questions regarding the reliability of the testing procedure – or its results – go to the weight of the scientific testimony and not to its admissibility. *McGrew v. State*, 682 N.E.2d 1289, 1292 (Ind. 1997). Napier also asserts that the conviction must be reversed because he was prevented from questioning a trained witness as to whether the particular machine that was used in his case had been set up according to approved methodology. He further posits, "the accuracy of a particular breath test is always at issue in a criminal case." Appellant's Br. p. 3. Hence, Napier is arguing that in the absence of the opportunity to conduct the meaningful cross-examination of a witness who has been trained in the set-up and operation of the breath-test equipment, and the basics of the science of breath testing, the rebuttal of the various presumptions – that the machine was in proper working order and that the operator was properly certified – as set forth in the statutes, constitute nothing more than an "empty promise." Appellant's Br. p. 4-5.

In sum, Napier urges on rehearing that we erred in determining that his inability to question a witness

regarding the reliability or accuracy of the test machine does not violate the Confrontation Clause pursuant to *Crawford*. To be sure, Napier contends that the determination of reliability of the evidence is placed into the hands of the department of toxicology, and grants the prosecutor a presumption that the determination made by the toxicology departments is reliable. Hence, such a procedure fails to provide for a witness who may be cross-examined about the reliability determination reflected in the certification, the accuracy of a particular test, or the presumptions applied to such evidence. Therefore, Napier contends that this procedure is fundamentally at odds with the right of confrontation.

Finally, Napier points out that we relied upon *Platt* for the notion that hearsay exceptions may be either judicially or statutorily created. While we cited *Mullins v. State*, 646 N.E.2d 40 (Ind. 1995) for the proposition that Indiana code section 9-30-6-15(a) created such an exception and provided for the admissibility of breath test evidence, Napier argues that we should have discussed *McEwen v. State*, 695 N.E.2d 79, 89 (Ind. 1998), which determined that when a statute and a judicially created rule both address the admissibility of evidence, and different standards for such admissibility are created, the statute is nullified. Along these lines, Napier contends that the procedural statute applied in *Mullins* should have been declared a nullity to the extent that it purports to admit a breath test result.

II. The State's Arguments

The State's petition for rehearing initially asserts that we should reconsider our analysis regarding the admissibility of a printout of breath test results because we

resolved the issue "on a ground not raised by Napier, . . . i.e., that the State failed to lay the proper foundation for the admission of the printout." Appellee's Br. p. 1. The State also contends that the rule set forth in *Crawford* does not apply here and that the cases we relied upon do not support a conclusion that the State was required to present live testimony to satisfy foundational requirements for the admission of printouts. Inasmuch as we have concluded above that the record shows that Napier did, in fact, stipulate to Officer Anderson's qualifications at trial, we now proceed to address the parties' arguments as they relate to *Crawford*.

The State argues that the *Crawford* rationale should not apply to evidence relating to the certification of breath test operators. That is, because we concluded that that evidence relating to instrument certification is not testimonial in nature, we should necessarily reach the same conclusion regarding evidence of operator certification. To be sure, the State argues that, as with instrument certifications, operator certification also has no bearing on an accused's guilt or innocence.

Also, the State argues that two of the cases we cited in our opinion – *State v. Lloyd*, 800 N.E.2d 196 (Ind. Ct. App. 2003), and *Wray v. State*, 751 N.E.2d 679 (Ind. Ct. App. 2001) – stand for the proposition that Napier was free to explore the issue of Officer Anderson's certification by presenting evidence that he was not properly certified as an operator. Hence, the State points out that Napier could have called Officer Anderson on his own to testify and that Napier made no offer of proof regarding any purported deficiencies as to Officer Anderson's qualifications. As a result, the State maintains that Napier was never *precluded* from exploring Officer Anderson's qualifications.

Rather, the State contends that Napier affirmatively chose not to do so. In essence, the State requests that we clarify our position as to whether the "live testimony" requirement in *Crawford* should apply to evidence regarding the proper performance of the test, and whether such testimony must be elicited directly from the operator.

III. Resolution on Rehearing

In addressing the contentions advanced by the parties, we stand by our original decision where we stated that "our statutes have permitted the State to introduce hearsay documents at trial in order to establish an evidentiary foundation regarding the inspection and compliance with relevant regulations of breath test instruments." *Napier*, 820 N.E.2d at 147. We noted in our prior opinion that Indiana Code section 9-30-6-5 allows for the introduction of certificates of the director of the Department of Toxicology regarding inspection and compliance issues. *Id.* Additionally, in *Mullins v. State*, 646 N.E.2d 40 (Ind. 1995), our supreme court held that "Section 9-30-6-15(a) creates, in fact, just such an exception, making breath-test results admissible in prosecutions under § 9-30-5." *Id.*

We went on to hold in our original opinion – and we reaffirm now – that certificates of inspection and compliance are not testimonial in nature and, thus, do not fall within the rule announced in *Crawford*. *Id.* In our view, a defendant's inability to cross-examine information that is contained in the certificates is not the same type of evidence that concerned the *Crawford* court.

In *Crawford*, it was determined that out-of-court statements that are "testimonial" in nature are inadmissible unless the declarant is unavailable and the defendant

had a prior opportunity to cross-examine him. *Crawford v. Washington*, 124 S.Ct. at 1374. Non-testimonial statements, however, continue to be governed by evidence rules on hearsay and by the United States Supreme Court's opinion in *Ohio v. Roberts*, 448 U.S. 56 (1980). *See id.* As we noted in our original opinion, the *Crawford* court declined to answer the pivotal question as to whether a particular statement is testimonial or non-testimonial. Specifically, the Court stated:

> We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id.

In examining the above, the evidence at issue here – instrument certification as well as operator certification – bears no similarity to the type of evidence that the Supreme Court labeled as testimonial. The common thread regarding the evidence described above is the type of evidence that it is gathered in an investigative or prosecutorial setting. To be sure, it is apparent that operators of the breath test machine are not certified for purposes that relate to any particular case. Rather, operator certifications in circumstances such as these should be considered a function that is ministerial in nature. And we again reaffirm our position that an operator's certification does not have a bearing on the issue of guilt or innocence.

Also, as we pointed out in our original opinion, it would be "unreasonable . . . to have a toxicologist in every court on a daily basis offering testimony about his inspection of a breathalyzer machine and the certification of the officer as a proper administrator of the breath test." *Napier*, 820 N.E.2d at 149. As the State suggests, other evidence is available that would, perhaps, be sufficient to establish the proper performance of a breath test. For instance, an individual might testify that he observed the test operator perform the test properly, it may be possible for the State to admit a checklist into evidence detailing the steps that the operator took, or a videotape showing proper performance of the test could be admitted. Hence, evidence regarding instrument certifications absent a defendant's opportunity to delve into the qualifications of those who performed the certifications is permissible, and evidence relating to instrument certification is not testimonial in nature.

In sum, the evidence indicating that Officer Anderson was qualified as a breath test operator was properly admitted, and there is no requirement that live testimony must be offered as to instrument or operator certification. For these reasons, we grant the parties' petitions for rehearing and remand this cause to the trial court with instructions that it reinstate Napier's conviction for operating a vehicle with a BAC of .08 percent or more as a class C misdemeanor.

SHARPNACK, J., and FRIEDLANDER, J., concur.

APPENDIX B

FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH E. NAPIER, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	)	No. 55A01-0406-CR-237

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane Spencer Craney, Judge
Cause No. 55D03-0311-CM-330

January 6, 2005

OPINION – FOR PUBLICATION

BAKER, Judge

This is a case of first impression, where we are called upon to decide the applicability of the rule set forth in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), as it relates to the State's method of establishing a proper

evidentiary foundation regarding the admissibility of various documents that are used to prove the results of a criminal defendant's breath test. Appellant-defendant Joseph E. Napier appeals his conviction for Operating a Vehicle With a BAC of .08 Percent Or More,[1] a class C misdemeanor, claiming that his conviction may not stand because admitting breath test results by certification documents and a BAC DataMaster Evidence Ticket (BAC ticket) violates the Confrontation Clause[2] of the United States Constitution. Napier further claims that the admission of the breath test ticket violates the Indiana Rules of Evidence, inasmuch as that evidence is inadmissible hearsay.

We conclude that the admission of the breath test instrument certification documents at issue here did not violate the rule set forth in *Crawford*. And our legislature has provided that certificates regarding the inspection and compliance with relevant regulations of breath test instruments are admissible in prosecutions for operating a vehicle with a BAC of .08% or greater. However, we also find that admitting into evidence the BAC ticket purporting to prove the breath test results – absent any "live" testimony that would establish a foundation for its admission – was improperly admitted. Thus, we reverse Napier's conviction on this basis.

FACTS

The parties do not dispute that Napier was operating his vehicle on November 12, 2003, at 1:30 a.m. in Morgan

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[1] Ind. Code § 9-30-5-1(a)(2).

[2] U. S. Const. Amend. VI.

County. Napier stipulated that the police officer that stopped him had probable cause to do so. Napier also did not dispute that there was probable cause to offer him a breath test.

While Napier was originally charged with Operating a Vehicle While Intoxicated (OVWI) as well as the BAC charge, the State subsequently dismissed the OVWI charge. During a bench trial that commenced on April 14, 2004, the State presented the certification of the breath test operator and the machine, and the breath test ticket showing Napier's BAC. The printout of the breath test showed that Napier's breath contained .14 grams of alcohol per 210 liters of breath. Neither the arresting officer nor any other "live" testimony was presented at trial.

During the course of the proceedings, the State sought to introduce the various certification materials contained in a document regarding the breath test machine that was used. Napier objected on the grounds that the admissibility of the document is controlled by the *Crawford* case and that "most hearsay exceptions contained in evidentiary rules and statutes are not permissible." Tr. p. 6. Napier went on to note that the fact that the particular machine was certified and satisfied certain accuracy requirements of regulations amounted to testimonial evidence. Napier further contended that he "can't cross-examine either the inspector's conclusions that are contained here in the . . . report or the director of the Department of Toxicology or his representative concerning whether he should or should not have certified the document." Tr. p. 7.

Napier then offered maintenance records of the BAC DataMaster that was used in the breath test, along with

records of a different DataMaster machine. Napier also objected to the admission of the instrument certification that the State offered on the grounds of hearsay and that *Crawford v. Washington* prohibits the admission of that evidence because it was testimonial and was not subject to cross-examination. Napier went on to object to the document's admissibility in accordance with this court's opinion in *Wray v. State*, 751 N.E.2d 679 (Ind. Ct. App. 2001), inasmuch as Napier asserted that *Wray* provided a defendant with

> the ability to attack this document's facial statement with contrary evidence showing in fact that it may not have been inspected in accordance with the regulations. Since I can't cross-examine the person I can attack the document under *Wray*. And if I can attack it and show that the regulations weren't followed then this document is not admissible. And if it's not admissible the first foundation requirement of the State getting the test in at all regardless of result has not been met. And in fact, the . . . the hearsay objection dovetails with this simply because the State has not [sic] required to call an inspector or a representative of the department to testify about how the machine's set up and about these issues so I can't cross examine on any of these things.

Tr. p. 13.

When the State offered Exhibit Three into evidence, which was a certified document showing a "recertification" of the breath test instrument, Napier's counsel lodged the following objection:

> [I]t's hearsay again. And the statutes permit the introduction of . . . certifications that are within 180 days prior to the test, and don't say anything

> about subsequent certifications. And since we . . . don't have an inspector here to examine him about what he went through with the certification process we don't know specifically how the director reached his conclusion on this one.

Tr. p. 17.

Finally, Napier objected to the printout of the breath test results that indicated a content of .14 grams of alcohol per 210 liters of breath upon the same grounds advanced that were advanced with respect to the other exhibits. Further, Napier's counsel remarked:

> This isn't a record that is kept in the course of directors inspections of machines. It . . . isn't even a certified document. It is clearly hearsay. It says to the Court that at a certain time my client's breath test result is .14. I can't question it about what it might have been at a time earlier when he was driving. I can't ask it questions about what might have effected [sic] this.
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> . . .
>
> I think this is just a straight up hearsay document that is inadmissible under both *Crawford*, the rules, and the statute.

Tr. p. 19, 23. In the end, the trial court overruled Napier's objections and all exhibits offered by the State were admitted into evidence. Napier was found guilty as charged, and he now appeals.

DISCUSSION AND DECISION

I. The Confrontation Clause, Crawford and the Certification Documents

In addressing Napier's argument that the admission of the certified documents regarding the inspection and regulations pertaining to the breath test machine was erroneous, we note that for a number of years, our statutes have permitted the State to introduce hearsay documents at trial in order to establish an evidentiary foundation regarding the inspection and compliance with relevant regulations of breath test instruments. To be sure, Indiana Code section 9-30-6-5 permits the introduction of certificates of the director of the Department of Toxicology regarding the inspection and compliance issues. The result of such a process is that a breath test evidence ticket may be introduced against a defendant without the defendant's ability to question the reliability or accuracy of the methodology that is used to obtain such a result.

In *Crawford*, the previously well-settled rule announced in *Ohio v. Roberts*, 448 U.S. 56 (1980) regarding the admissibility of hearsay evidence under the Sixth Amendment's Confrontation Clause was overturned. As was observed in *Crawford*, the *Roberts* court permitted the introduction of hearsay statements made by an unavailable declaration so long as the statement fell under a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." 124 S.Ct. at 1369. But with the rule announced in *Crawford*, it is now the law that when the prosecution seeks to introduce a "testimonial" out-of-court statement into evidence against a criminal defendant, the Confrontation Clause requires two showings: (1) that the witness who made the statement is

unavailable; and (2) that the defendant had a prior opportunity to cross-examine the witness. *Id.* at 1374.

Here, the State contends that the certificates of inspection and compliance are not testimonial in nature and, therefore, do not fall within the rule pronounced in *Crawford*. While the *Crawford* court did not precisely define the word "testimonial," a number of examples were noted:

> Ex parte in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial, were examples of evidence cited by the Supreme Court as being 'testimonial in nature.'

Id. at 1364.[3]

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[3] The meaning of "testimonial" evidence has been addressed by this court in two very recent decisions: *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), and *Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004), both of which were handed down on the same day. These cases involved domestic battery convictions where the respective victims did not appear to testify, and the State proceeded with its prosecution on the basis of statements that the victims had supplied to the police that were admitted into evidence under the excited utterance exception to the hearsay rule. We recognized the *Crawford* court's determination that "testimonial" statements need not be under oath. It is apparent that our supreme court is also wrestling with the definition of "testimonial

(Continued on following page)

We note that prior to *Crawford*, our supreme court addressed a confrontation objection to the State's use of certification documents like the ones at issue here, where it found that such evidence could be used instead of live testimony. Specifically put, the court in *Platt v. State*, 589 N.E.2d 222 (Ind. 1992), upheld the "admissibility of certified documents in lieu of live testimony to prove the machines are in working order and the operators are sufficiently trained to use them." *Id.* at 230 n. 7. It was further observed that:

> As we said earlier, for a statute to be declared unconstitutional, its fatal defects must be clear. None are apparent in Ind.Code § 9-11-4-5 [now I.C. § 9-30-6-5]. Platt was not deprived of his confrontation rights. He had the opportunity to confront his accuser face-to-face. It was Deputy Ruch. The alternative would be to have a toxicologist in every courthouse every day giving testimony concerning his or her actual inspection of a particular Intoxilyzer machine, and his or her certification of the officer as a competent administrator of the test.

Id. at 230.

In light of the above, it is apparent that our supreme court has accepted the proposition that hearsay exceptions may be either judicially or statutorily created. Indeed, in *Mullins v. State*, 646 N.E.2d 40 (Ind. 1995), it was held that "Section 9-30-6-15(a) creates, in fact, just such an exception, making breath-test results admissible in prosecutions under § 9-30-5." *Id.* at 48. This statute allows

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evidence," inasmuch as transfer was granted in both *Hammon* and *Fowler* on December 9, 2004.

for the introduction of evidence of the alcohol level in an individual's blood as ascertained by a test of the blood, breath or urine. There is also a presumption that a test taken within a three-hour period accurately reflects a defendant's BAC level at the time of the offense.

Napier notes that this court reversed a defendant's conviction for operating a vehicle with a blood alcohol content of at least .10% when the uncontradicted evidence at trial established that the operator of the breath test machine was not properly certified under the Department of Toxicology regulations. *Wray v. State*, 751 N.E.2d 679, 683 (Ind. Ct. App. 2001), *superseded by regulation on other grounds*, *State v. Lloyd*, 800 N.E.2d 196 (Ind. Ct. App. 2003). We rejected the State's contention that harmless error resulted, and noted that the police officer's breath test operator certificate should have been deemed inadmissible under the circumstances. *Id.* at 684. Hence, we held that "[w]ithout evidence of Wray's blood or breath alcohol content pursuant to a chemical analysis, we are unable to affirm his conviction." *Id.*

In this case, the State introduced the Director of Toxicology's certificate, which stated that an inspection and tests were performed on the machine on a specified date, and that "[t]he instrument is in good operating condition satisfying the accuracy requirements set out by the State Department of Toxicology Regulations." Appellant's App. p. 93. The certificate specifies that: "[t]he original Letter of Certification, issued by the State Department of Toxicology, must be kept on file in the office of the Clerk of the Circuit Court and may be duplicated as needed for use in Court." *Id.* The result is that the evidentiary foundation is satisfied for the admissibility of the breath test evidence ticket, the certificate of inspection

and compliance. Moreover, the certificate of inspection and compliance is proffered, admitted, and treated as prima facie evidence not only as to what it states regarding inspection and compliance, but as to the inference to be given to it by the trial court that the machine was in working order at the time of the breath test.

Even if it could be said that these types of certificates are akin to affidavits as Napier urges and, therefore, should be considered "testimonial" under *Crawford*, we do not see how the admission of these certificates would serve to preclude any meaningful cross-examination of the breath test evidence presented against him. Even though the inspector of the machine and the Director of Toxicology who executed the certification of inspection did not testify at trial, the information contained in the certificates does not pertain to the issue of guilt. Rather, that information simply goes to inspection and certification matters. *See Platt*, 589 N.E.2d at 230. In our view, a defendant's inability to cross-examine that information which is contained in the certificates is not similar to the type of evidence that was of concern to the *Crawford* court. Otherwise, the unreasonable alternative is to have a toxicologist in every court on a daily basis offering testimony about his inspection of a breathalyzer machine and the certification of the officer as a proper administrator of the breath test. Such a practice is obviously impractical. Additionally, as was observed in *Crawford*:

> The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's;

> that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Id. at 1363.

In considering this language, it is our view that the inspection and operator certifications are simply not included in the class of evidence that pertains to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial and to police interrogations" identified by the *Crawford* court as "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 1374. That said, we reject Napier's contention that this evidence was improperly admitted simply because there was no "live testimony" offered by the State to establish an evidentiary foundation with regard to the breath test machine's certification and inspection. Hence, we cannot say that the trial court erred in admitting this evidence at trial. As a result, we conclude that the procedures permitted by our supreme court and our legislature for establishing a foundation for the admission of the certifications regarding the breath test machine and the regulations of the Toxicology Department do not run afoul of the rule announced in *Crawford* and the Confrontation Clause. Thus, Napier does not prevail on this issue.

II. Admissibility Of Breath Test Results

In a related issue, Napier contends that his conviction must be reversed on the grounds that the printout of the evidence ticket was improperly admitted to prove the

results of his breath test. As Napier argued above, he urges that the admission of this evidence to establish the existence of his blood alcohol level was inadmissible hearsay under our statutes, the court rules and *Crawford*.

A. Standard of Review

In resolving this issue, we note that this court has determined that the results of chemical breath tests are not admissible if the test operator, test equipment, chemicals used in the test, or techniques used in the test have not been approved in accordance with the rules adopted by the Department of Toxicology. *Fields v. State*, 807 N.E.2d 106, 109 (Ind. Ct. App. 2004), *trans. denied*; *see also* Ind. Code § 9-30-6-5(d). The admission of chemical breath test results is left to the sound discretion of the trial court and will be reviewed for an abuse of discretion. *State v. Molnar*, 803 N.E.2d 261, 265 (Ind. Ct. App. 2004). Because the State is the party offering the results of the breath test, it bears the burden of establishing the foundation for admitting the results. *Id.* Therefore, the State must set forth the proper procedure for administering a chemical breath test and show that the operator followed that procedure. *Id.*

B. Napier's Claims

In addressing Napier's argument that the method in which the State sought to prove the breath test results [sic] was erroneous, we note that the Department of Toxicology sets the standards and regulations for the selection and certification of breath test equipment and chemicals. I. C. § 9-30-6-5(a)(2); *Fields*, 807 N.E.2d at 111. Results of a chemical breath test are not admissible, however, if the

test equipment or chemicals used have not been approved in accordance with the rules promulgated by the Department of Toxicology. I.C § 9-30-6-5(d). In essence, for results of a breath test to be admissible, three foundational requirements are necessary: (1) the operator who administered the test must be certified by the Indiana University School of Medicine Department of Pharmacology and Toxicology; (2) the equipment used in the test must have been inspected and approved by the Department of Toxicology; and (3) the operator must have followed the procedures approved by the Department of Toxicology. *Lloyd*, 800 N.E.2d at 199. Hence, we held in *Lloyd* that the Deputy Sheriff's certification was admissible under the public records exception to the hearsay rule[4] when the above requirements were established, and the Deputy testified at trial that he had completed the requisite number of training hours. *Id.*

More recently, in *Haddin v. State*, 812 N.E.2d 1057 (Ind. Ct. App. 2004), the defendant argued that the results of his chemical breath test were erroneously admitted into evidence because the arresting officer was not continuously present during the twenty minute waiting period before the breath test. Hence, he sought a reversal because the proper procedures had not been followed. *Id.* at 1059. At trial,

> Officer Hancock testified that he instructed Haddin to remove his chewing gum before he began the twenty-minute waiting period. The record also indicates that, after the twenty-minute waiting period, Officer Hancock inspected the breath test machine and found that it was in working

[4] Ind. Evidence Rule 803(8).

> order. Additionally, Officer Hancock testified that, after the breath test, the results revealed that there was no indication of a foreign substance in Haddin's mouth at the time of the test.

Id. at 1060. In light of this testimony, we concluded that the officer followed the rules for administering the breath test as promulgated by the Department of Toxicology, and we held the breath test results admissible. *Id.*

Unlike the circumstances in *Lloyd* and *Haddin*, the State, in this case, offered the DataMaster "evidence ticket" into evidence displaying the breath test results, absent any witness to present that exhibit. Hence, Napier was not only precluded from conducting any cross-examination with respect to the breath test operator's qualifications, he was not afforded the opportunity to question or attack the purported results of his breath test. Without that "live" testimony, Napier could not challenge those results. And the ability to challenge the breath test results directly pertains to the issue of guilt or innocence in this case.

We also note that the defendant in *Wray* was able to cross-examine the officer who administered the breath test and, because of that opportunity, the defendant was able to establish that the officer was not trained in most of the areas in which the regulations require breath test operators to be trained. *Wray*, 751 N.E.2d at 683. Hence, we were presented with uncontradicted evidence that the breath test operator was, in fact, not properly trained pursuant to the Department Of Toxicology's regulations. In these circumstances, we are of the view that the State's manner of proving Napier's breath test results failed because the State failed to lay an adequate evidentiary foundation for their admission into evidence. We must

conclude, therefore, that the State's failure to present any "live testimony" at trial from the officer who conducted the tests runs afoul of the Confrontation Clause of the Sixth Amendment to the United States Constitution in light of *Crawford*. That is, the State failed to establish an adequate evidentiary foundation for the admission of the test results into evidence. Hence, we find that the trial court abused its discretion in admitting Napier's breath test results into evidence, and his conviction is reversed on this basis.

SHARPNACK, J., and FRIEDLANDER, J., concur.

APPENDIX C

[SEAL]
David C. Lewis
Clerk

CLERK

SUPREME COURT, COURT OF APPEALS,
AND TAX COURT

STATE OF INDIANA

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Cause Number

55A01-0406-CR-00237
Lower Court Number:
55D030311CM330

NAPIER, JOSEPH E. -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 7/26/05

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING

MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR. GP

WITNESS my name and the seal of said Court,

this 26TH day of JULY, 2005

/s/ David C. Lewis
Clerk, Supreme Court, Court of
Appeals and Tax Court

(2)

No. 05-824

FILED
JAN 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JOSEPH E. NAPIER,

Petitioner,

v.

INDIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Indiana
First District

BRIEF *AMICUS CURIAE* OF NATIONAL COLLEGE FOR DUI DEFENSE IN SUPPORT OF PETITION OF JOSEPH E. NAPIER

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January 23, 2006

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QUESTION PRESENTED

WHETHER INDIANA'S PROCEDURE IN DRUNK DRIVING CASES, WHICH PERMITS THE ADMISSION AGAINST THE DEFENDANT OF A LETTER OF CERTIFICATION AND A BREATH TEST EVIDENCE TICKET WITHOUT THE OPPORTUNITY FOR CROSS-EXAMINATION, VIOLATES THE CONFRONTATION CLAUSE?

LIST OF INTERESTED PARTIES

The caption contains the names of all the parties below.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National College for DUI Defense is a non-profit professional organization founded in 1995. The mission of the College includes assisting its members in the defense of their clients charged with drinking and driving offenses and the advancement of liberty through constitutional advocacy. The College has approximately 700 members throughout the United States and sponsors or co-sponsors at least four major continuing education programs annually specializing in issues relating to the defense of persons charged with driving under the influence. The College's Summer Program has been continuously presented at the facilities at Harvard Law School since 1996. Winter Sessions have been given every year since 1997. The College also co-sponsors training and educational seminars with the National Association of Criminal Defense Lawyers and the Texas Criminal Defense Lawyers' Association.

The National College for DUI Defense believes that the Confrontation Clause issue raised by Napier's Petition is extremely important due to the unsettled state of the law, the numerous conflicting reported decisions, and the frequency with which this issue occurs in trial courts nationwide. This Court should grant the Petition, reverse the Indiana Court of Appeals, and hold that defendants such as Napier have a Sixth

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Amendment right to cross-examine the technicians and police officers who inspect, test, and operate breath test machines.

REASON FOR GRANTING THE WRIT

INDIANA'S PROCEDURE IN DRUNK DRIVING CASES, WHICH PERMITS THE ADMISSION AGAINST THE DEFENDANT OF A LETTER OF CERTIFICATION AND A BREATH TEST EVIDENCE TICKET WITHOUT THE OPPORTUNITY FOR CROSS-EXAMINATION, VIOLATES THE CONFRONTATION CLAUSE

SUMMARY OF ARGUMENT

The Supreme Court, in *Crawford v. Washington*, 541 U.S. 36 (2004), stated a new rule to determine when and whether the admission of hearsay at a trial violates the Sixth Amendment Confrontation Clause. If the hearsay is "testimonial" it may only be admitted if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. Otherwise the witness must be present and subject to cross-examination. As a result of *Crawford*, many courts have had to reexamine previously well-settled law concerning admission of hearsay. In drunk driving cases, there are two types of witnesses who have testimony to offer relevant to the admission of breath and blood alcohol test results. The first kind of witness is usually an officer who administers a breath test, a nurse who draws blood directly from the defendant, or chemist who personally tests the defendant's blood and completes an affidavit detailing what he did or signs a print out or other document bearing test results. The second kind of

witness is the person who examines, tests, and in many jurisdictions, certifies the equipment used in the breath or blood test and prepares an affidavit so stating. This brief will collectively refer to these witnesses as "breath and blood test technicians." This brief argues that both kinds of statements are "testimonial," because: they qualify under general formulations of "testimonial" discussed in *Crawford*, 541 U.S. at 51-52; there is a historical basis for considering these statements to be testimonial, i.e., they are more analogous to coroner statements than mere business records because blood and breath testing is done for purposes of litigation; the better reasoned lower court cases hold that breath and blood technician statements are "testimonial"; there is a need to cross-examine the breath and blood test technicians in order to challenge the accuracy and reliability of the test result; this Court's due process cases have assumed the ability to cross-examine these witnesses; and cases and news stories contain numerous examples of incompetence, neglect, accident, and fraud, with respect to scientific evidence, which could only be fully uncovered with the aid of cross-examination. Therefore, *Crawford* requires the presence of these witnesses in court for cross-examination, in the absence of unavailability and a prior opportunity to cross-examine, in order for test results to be admitted in evidence.

In *Napier v. State*, 827 N.E.2d 565 (Ind.App. 2005), the Indiana Court of Appeals affirmed a conviction for driving under the influence *per se*,[2] where both an inspection certificate and breath test printout were allowed in

[2] The under the influence *per se* statute under which Napier was convicted prohibits driving with a breath alcohol content of .08 or more and less than .15 grams per 210 liters of breath. Ind. Code § 9-30-5-1(a).

evidence without any opportunity for cross-examination.[3] Because the issue presented by Napier's case is an issue that is litigated frequently in drunk driving cases nationwide with conflicting results, and is not likely to be resolved by the *Crawford* cases this Court has already agreed to review, the Petition for a Writ of Certiorari should be granted.

I. *Crawford v. Washington* requires the statements of breath and blood test technicians to be considered testimonial

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court determined that the admission of "testimonial" hearsay at a trial violates the Sixth Amendment Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness, and overruled *Ohio v. Roberts*, 448 U.S. 56 (1980) with respect to testimonial statements. The Court noted that the Framers did not intend for the reliability of a statement to be determined preliminarily by judges, but rather to be made by fact-finders after being tested through cross-examination, *Crawford*, at 61-62, and that other courts had made preliminary reliability determinations under *Roberts* inconsistently and incorrectly. *Id.* at 62-64. The rule in *Roberts*, that a statement admitted under a hearsay exception would not violate the Confrontation Clause if the statement bore adequate indicia of reliability either because the exception was "firmly rooted" or

[3] Napier stipulated to the qualifications of the breath test operator and that he followed the required procedures, but objected to the admission of the breath test printout without an opportunity to cross-examine the operator.

the statement had "particularized guarantees of trustworthiness," remained viable insofar as non-testimonial hearsay was concerned. *Id.* at 68.

While *Crawford* did not define the term "testimonial," it did offer some examples of possible definitions.

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition-for example, *ex parte* testimony at a preliminary hearing.

Crawford, at 51-52. The Court also gave other specific examples of kinds of statements that historically either were or were not "testimonial." For example, it noted that coroner statements were not allowed in American courts.

Id. at 47, 49. Police interrogations, the kind of statements at issue in *Crawford*, fall well within any definition of the term "testimonial." *Id.* at 52-53. On the other hand, the Court said that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial - - for example, business records or statements in furtherance of a conspiracy." *Id.* at 56.

Using these definitions and examples as a guide, affidavits or statements of breath and blood test technicians must be considered to be testimonial. Statements of breath and blood test technicians qualify under all of the formulations referred to by the Court, "'affidavits . . . that the defendant was unable to cross-examine . . . that declarants would reasonably expect to be used prosecutorially,'" "'formalized testimonial materials, such as affidavits,'" and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Crawford*, at 51-52. With reference to the Court's specific kinds of statements, affidavits of breath and blood technicians are also more analogous to coroner statements than mere business records because they are scientific in nature, and are prepared by the police or state employees pursuant to statute and regulation for use in litigation against the defendant in criminal cases. Only through cross-examination may the defendant uncover mistakes or error in the administration of these tests and the preparation of these reports.

II. The better reasoned cases consider statements of breath and blood test technicians to be "testimonial"

The lower courts are divided on the question presented here: whether the affidavits or statements of

breath and blood test technicians are testimonial. The decisions turn generally on whether the court finds the statement to be a mere business record. For example in the following cases, courts have found statements of blood and breath test technicians to be testimonial. *Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) (nurse who withdrew blood was a testimonial witness, but statute requiring proffer of dispute with testimony prior to confronting witness did not violate Confrontation Clause); *Shiver v. State*, 900 So.2d 615, 618 (Fla. App. 2005) (affidavit prepared by officer that stated that breath test instrument was properly calibrated constituted testimonial hearsay evidence); *Belvin v. State*, ___ So.2d ___, 2005 WL 1336497 (Fla. App. 4th Dist. June 8, 2005) (breath technician's affidavit held to be testimonial). Other courts have reached a similar conclusion regarding affidavits or statements of technicians in drug and other criminal cases. *E.g.*, *People v. McClanahan*, 729 N.E.2d 470 (Ill. 2000) (pre-*Crawford* decision holding Illinois provision allowing drug report in evidence without showing of unavailability of technician violated the Confrontation Clause); *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y.App.Div. 2004) (blood alcohol result of alleged sexual assault victim inadmissible because defendant had right to cross-examine witnesses regarding authenticity of sample and cross-examine regarding the testing methodology); *Johnson v. State*, ___ So.2d ___, 2005 WL 2138714 (Fla.Dist.Ct.App. Sept. 7, 2005) (law enforcement officer who performed lab test on alleged cocaine); *Commonwealth v. Carter*, 861 A.2d 957, 969 (Pa. Super.Ct. 2004) (lab report identifying a confiscated substance as cocaine constituted inadmissible hearsay and its admission violated defendant's right to confront witnesses against him "when the court admitted

the lab report without the testimony of the forensic scientist who performed the mechanics of the testing and prepared the report"); *cf.*, *People v. Hernandez*, 794 N.Y.S.2d 788, 789 (N.Y.Sup.Ct. 2005), (latent fingerprint report is testimonial, though it is a business record, because the fingerprints "were taken with the ultimate goal of apprehending and successfully prosecuting a defendant").

Other courts have reached the opposite conclusion, that such reports, affidavits or statements are business records and therefore non-testimonial, admissible hearsay. *People v. Johnson*, 18 Cal.Rptr.3d 230 (Cal.Ct.App. 2004) (laboratory reports); *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (laboratory report on weight of cocaine); *State v. Dedman*, 102 P.3d 628 (N.M. 2004) (blood alcohol content reports); *People v. Brown*, 801 N.Y.S.2d 709 (N.Y.Sup.Ct. 2005) (DNA testing records); *People v. Kanhai*, 8 Misc.3d 447, 797 N.Y.S.2d 870 (N.Y.Crim.Ct. 2005) (breathalyzer test results); *People v. Durio*, 794 N.Y.S.2d 863 (N.Y.Sup.Ct. 2005) (autopsy reports); *Moreno Denoso v. State*, 156 S.W.3d 166 (Tex.App. 2005) (autopsy reports); *Luginbyhl v. Commonwealth*, 618 S.E.2d 347 (Va.App. 2005) (report from breathalyzer machine and technician's certificate of calibration were business records).[4]

The cases holding that such technical affidavits and statements are testimonial are more persuasive for a

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[4] This Court has recently accepted two cases for argument to resolve another *Crawford* issue, whether 911 calls are testimonial. *Hammon v. Indiana*, ___ U.S. ___, 126 S.Ct. 552 (2005); *Davis v. Washington*, ___ U.S. ___, 126 S.Ct. 547 (2005). These cases, dealing with the excited utterance exception to the rule against hearsay, are unlikely to resolve the issue presented by Napier.

number of reasons. As noted above, these cases are consistent with *Crawford's* proposed formulations of testimonial hearsay, as well as the historical practice in this country of excluding coroner statements. Breath and blood test technician statements are prepared pursuant to statute and regulation *solely* for the purpose of litigation in criminal cases. Additionally, in drunk driving cases, where the allegation is a violation of a driving under the influence per se statute, the test is quantitative, as opposed to qualitative, and the result constitutes the sole evidence of an element of the offense. In fact, assuming the defendant can be shown to have been driving, the test result essentially *is* the offense. Furthermore, due to the nature of blood and breath testing, there are many issues relating to the accuracy and reliability of the test result which are relevant to admissibility and/or weight of the evidence and which constitute fertile ground for cross-examination.[5] In

[5] These issues are more fully set forth in Section III of this Argument, *infra*. Drunk driving cases are typically comprised of the observations of witnesses, usually police officers, standardized and/or unstandardized field sobriety tests, and a breath test. This evidence is often inherently unreliable, subjective and can be difficult to defend against. The observational evidence is often susceptible to more than one interpretation, consistent with both guilt and innocence. One case analyzing evidence often offered in drunk driving cases, the National Highway Traffic Safety Administration's (NHTSA) standardized field sobriety tests, is *United States v. Horn*, 185 F.Supp.2d 530 (D.Md. 2002). The United States District Court for the District of Maryland comprehensively analyzed these "tests," not as scientific tests, but as involving "technical or other specialized knowledge" under the Federal Rules of Evidence, Rule 702, and concluded that they were too unreliable to satisfy *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Judged against a .10 blood alcohol concentration (BAC) limit, the false positive arrest rates for horizontal gaze nystagmus, walk and turn, and one leg stand, according to NHTSA's own studies were 47% in a 1977 study and 32% in a 1981 Final Report. The *Horn* opinion also considered testimony that field validation studies, for the standardized

(Continued on following page)

order to challenge the accuracy and reliability of any test, the defendant must be able to fully cross-examine the blood and breath technicians.

III. There is a need to cross-examine the breath and blood test technicians in order to challenge the accuracy and reliability of the test result

All alcohol breath testing programs have common foundational elements that must be proven in order for a test result to be admitted in evidence. Many states also have unique statutory or regulatory prerequisites that must be satisfied for a test result to be admitted in evidence. *E.g.*, *State v. Ripple*, 637 N.E.2d 304 (Oh. 1994) (required regulations not enacted); *State v. Tanner*, 457 So.2d 1172 (La. 1984) (regulations did not comply with statute). Conversely, problems with any of these elements can form the basis for an admissibility or weight attack by the defendant. The foundation is necessary to show the test result is accurate and the process by which it was obtained reliable. The extent to which the blood or breath test technician has adhered to common or state specific foundational requirements is always fertile ground for cross-examination.

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field sobriety tests at lower BAC limits were "scientifically unacceptable," because of a high number of unsafe drivers tested, the lack of controls, and multiple variables affecting the arrest decisions. *State v. Lasworth*, 42 P.3d 844 (N.M.App. 2001). Given the highly unreliable nature of this observational evidence, it is critical that a suspect be given a reasonable and realistic opportunity to cross-examine the breath and blood test technicians in order to receive a fair trial.

Many states require breath testing equipment to be approved by the Department of Transportation and/or by a qualified individual who is required by statute or regulation to select the equipment used. *E.g.*, Alaska Stat. § 28.35.033(d); Georgia Code Ann., § 40-6-392(a)(1)(A); Md. Code Ann., Cts. & Jud. Proc. Art. § 10-304(b); Wis. Admin. Code § Trans. 311.04(1); *see*, Conforming Products List of Evidential Breath Measurement Devices, 38 Fed. Reg. 30459, 39 Fed. Reg. 41399, 49 Fed. Reg. 48854, 49 Fed. Reg. 48864, 58 Fed. Reg. 48705, 62 Fed. Reg. 62091, 67 Fed. Reg. 62091, 69 Fed. Reg. 42237. Often statutes or regulations specify procedures that must be adhered to in order for an approval to be issued. *See, e.g., Ex parte Mayo*, 652 So.2d 201 (Ala. 1994) (regulations approved by wrong agency); *Manning v. Dept. of Pub. Safety*, 71 P.3d 527 (Ok. Civ. App. 2003) (machine not approved).

In addition to requiring compliance with certain protocols before these breath test devices are used evidentially, many states, like Indiana, have provisions allowing a certificate of the person who certifies the machine to be entered in evidence without the person appearing personally in court *E.g.*, Ind. Code Ann. § 9-30-6-5(c)(1) and (2); Georgia Code Ann., § 40-6-392(f); Md. Code Ann., Cts. & Jud. Proc. Art. § 10-304(d). The validity of these statutes is now in question as a result of *Crawford*.

All breath testing programs require a calibration of the test equipment using a known standard reference solution. The standard reference solution (or dry gas) is or should be traceable to a standard from the National Institute of Standards and Technology (NIST) or some comparable standard (traceable to NIST) tested at precisely 34°C as measured by a thermometer which should also be traceable to NIST. *City of Seattle v. Clark-Munoz*,

93 P.3d 141 (Wash. 2004). If the temperature of the standards is off at the time the instrument is calibrated, erroneous readings of defendant's breath could result. Possible subjects for cross-examination include whether the equipment was properly tested and checked, whether the solutions were properly tested and checked, and whether the solutions and thermometers are traceable to NIST. Additionally, cross-examination can be focused on determining whether any aspect of the calibration, maintenance or testing of the equipment has been marred by incompetence, negligence, accident, or fraud.

All breath test devices contain computer programs which must accurately convert electrical impulses into a measurement of alcohol. The nature and adequacy of the computer programs are also fruit for cross-examination. Currently, manufacturers are refusing to disclose the source codes for the computer software, even in the face of court orders. *See*, Lauren Etter, *Florida Standoff on Breath Tests Could Curb Many DUI Convictions*, Wall Street Journal, Dec. 16, 2005, A1; Geri L. Dreiling, *Dui-Test Fight Blows Through Florida: Defendants Demand Access to Device's Software Code*, ABA Journal Report, Nov. 18, 2005, available at http://www.abanet.org/journal/ereport/n18breath.html.

The tests themselves require the operator to closely observe the testee for fifteen or twenty minutes to make sure the person does not eat or drink anything or regurgitate or belch. *State v. Baker*, 355 P.2d 806 (Wash. 1960) (observation was for fourteen minutes, test suppressed); *State v. Korsakov*, 34 S.W.3d 534 (Tenn.Crim.App. 2000) (officer was doing paperwork, observation insufficient); *State v. McCaslin*, 894 S.W.2d 310 (Tenn.Crim.App. 1994) (officer watching defendant in back seat of patrol car while

driving to the police station did not qualify as proper observation). Otherwise the breath sample may be contaminated by mouth alcohol which can result in a false high reading. M. Mason & K. Dubowski, *Breath as a Specimen for Analysis for Ethanol and Other Low-Molecular-Weight Alcohols*, Medical-Legal Aspects of Alcohol 177, 180 (James C. Garriott ed., 4th ed. 2003). Cross-examining the breath test officer about his diligence in observing the defendant is often a fruitful area for cross-examination. Additionally, if the defendant has gastroesophogeal reflux disease (GERD), dentures, or mouth jewelry observed by the officer, a defense to admissibility or weight may be generated which could be explored on cross-examination. *E.g.*, A.W. Jones, *Reflections on the GERD Defense*, DWI Journal: Law & Science, 3 (Sept. 2005); *People v. Bonutti*, 788 N.E.2d 331 (Ill.App. 2003) (affirming suppression of the breath test where the defendant suffered from GERD). The test protocols usually include testing at 34°C of a control sample that should be traceable to NIST. K.M. Dubowski, *Quality Assurance in Breath-Alcohol Analysis*, 18 Journal of Analytical Toxicology 306, 310 (Oct. 1994). Finally, most states require the state to prove the officer administering the test is properly trained and certified in the use of the equipment. Wis. Admin. Code § Trans. 311.08; Md. Code Ann., Cts. & Jud. Proc. Art. § 10-304(b).

Even assuming breath and blood test technicians are able to establish compliance with all of the necessary prerequisites for a test result to be admitted in evidence, there are many other issues that might be raised in cross-examination of breath and blood test technicians which are within the training and knowledge of these witnesses and could affect the weight the factfinder gives to the test

result. Breath tests constitute evidence that is questioned by many scientists. Scientific studies indicate that breath testing for alcohol is an unreliable way to determine blood alcohol content if the person has not fully absorbed the alcohol into their system. G. Simpson, *Accuracy and Precision of Alcohol Measurements for Subjects in the Absorptive State*, 33 Clin. Chem. 753 (1987). Studies have shown ranges from as low as 12 to as high as 166 minutes, or at the high end almost two and one half hours from the end of drinking until alcohol is fully absorbed into the system. K.M. Dubowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, 10 J. Stud. Alcohol Suppl. 98, 105 (July 1985). Even if all of the alcohol is absorbed into the body, the breath test device assumes the ratio of blood alcohol to breath alcohol is 2100:1. In order to arrive at a measurement the breath reading is multiplied by 2100. This overestimates BAC in a high percentage of all defendants, since the range of ratios varies according to one study in 99.7% of persons tested from 1555:1 to 3005:1. *Id.* at 102. Persons with a lower than 2100:1 ratio would have their levels overestimated.

Additionally, breath temperature, which is assumed to be 34°C, can affect the reading by 6.5% per degree centigrade. In Alabama, where the breath testing instrument corrects for high temperature readings, between 83 and 91% of all tests reported in one study had to be corrected. D.A. Carpenter, J.M. Buttram, *Breath Temperature: An Alabama Perspective*, 9 IACT Newsletter 16 (July, 1998). Amazingly, even though all breath tests require the defendant's breath temperature to be 34°C, a temperature over 34°C will produce a false high reading, a majority of breath samples as demonstrated by the Alabama study are

over 34°C, and the technology exists to measure breath temperature, *the vast majority of jurisdictions in the United States do not employ breath test machines that can measure the defendant's breath temperature.*

Other factors leading to unreliability in breath test measurements include breathing pattern, A.W. Jones, *How Breathing Technique Can Influence the Results of Breath-Alcohol Analysis*, 22 Med.Sci. Law 275 (1982), and hematocrit,[6] D.A. Labianca, *The Chemical Basis of the Breathalyzer*, 67 Journal of Chemical Education 259, 261 (March 1990).

The legislature's response to this problem in many jurisdictions, has been to redefine impairment in terms of the breath level as opposed to blood. *E.g.*, Ind. Code Ann., § 9-30-5-1; Md. Code Ann., Transp. Art. § 11-103.2 ((a) "Alcohol concentration" means: . . . (2) The number of grams of alcohol per 210 liters of breath."). This change has been criticized by some scientific authors as "the legislation of incorrect science." D.A. Labianca, G. Simpson, *Medicolegal Alcohol Determination: Variability of the Blood- to Breath-Alcohol Ratio and Its Effect on Reported Breath Alcohol Concentrations*, 33 Eur. J. Clin. Chem. Clin. Biochem. 919 (1995). "Unless the law is concerned with convicting the many, while ignoring the few, this case

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[6] "The hematocrit represents the fraction of whole blood composed of red cells and is correlated with the aqueous content of blood. The higher the hematocrit, the lower the concentration of water in blood, and vice versa. The average hematocrit for normal, healthy males is 47%, with a range of 40-54%; for females the average is 42% and the range is 36-47%." D.A. Labianca, *The Chemical Basis of the Breathalyzer*, 67 Journal of Chemical Education 259, 261 (March 1990). "Given that the Breathalyzer uses only one partition ratio, Smith and Payne, et al. have predicted that the normal variation in hematocrit can produce errors in breath test results in the 10 to 14% range." *Id.*

demonstrates the desirability of offering all defendants the chance to have their breath-alcohol concentrations checked by analysis of blood or urine." D.J.H. Trafford, H.L.J. Makin, *Breath Alcohol Concentration May Not Always Reflect the Concentration of Alcohol in Blood*, 18 Journal of Analytical Toxicology 225, 228 (Jul.-Aug. 1994); *see generally*, Leonard R. Stamm, *The Top 20 Myths of Breath, Blood, and Urine Testing*, Champion, 20 (Aug. & Sept./ Oct. 2005).

Napier's case illustrates how a statute such as Indiana's permits the State to prove almost its entire case by affidavit. Here the affidavits and tickets proved the proper inspection, calibration, and set-up of the machine, that the machine was in proper working order, and that the Defendant's test result was over the legal limit, as is allowed by Ind. Code Ann. §§ 9-30-6-5(c)(1) and (2) and 9-30-6-5(d).

The questionable reliability of chemical test evidence in drunk driving cases, combined with its heightened importance to the determination of guilt or innocence, and the many foundational facts proven and placed at issue when a simple affidavit is accepted in evidence, require that the defendant be afforded an opportunity to cross-examine the State's breath and blood test technicians in order for the fact-finder to properly assess the reliability of the test result.

IV. This Court's due process cases have assumed the ability to cross-examine breath and blood test technicians

The Supreme Court recognized in *California v. Trombetta*, 467 U.S. 479 (1984) that the state need not preserve potentially exculpatory breath samples because there were

other ways for the defendant to prove his innocence. The Court said:

> Even if one were to assume that the Intoxilyzer results in this case were inaccurate and that breath samples might therefore have been exculpatory, it does not follow that respondents were without alternative means of demonstrating their innocence. Respondents and amici have identified only a limited number of ways in which an Intoxilyzer might malfunction: faulty calibration, extraneous interference with machine measurements, and operator error. See Brief for Respondents 32-34; Brief for California Public Defender's Association et al. as Amici Curiae 25-40. Respondents were perfectly capable of raising these issues without resort to preserved breath samples. To protect against faulty calibration, California gives drunken driving defendants the opportunity to inspect the machine used to test their breath as well as that machine's weekly calibration results and the breath samples used in the calibrations. See supra, at 2530. Respondents could have utilized these data to impeach the machine's reliability. As to improper measurements, the parties have identified only two sources capable of interfering with test results: radio waves and chemicals that appear in the blood of those who are dieting. For defendants whose test results might have been affected by either of these factors, it remains possible to introduce at trial evidence demonstrating that the defendant was dieting at the time of the test or that the test was conducted near a source of radio waves. *Finally, as to operator error, the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise*

> *doubts in the mind of the factfinder whether the test was properly administered.*

Id. at 490 (emphasis added).

Thus one of the underpinnings of the *Trombetta* decision was the defendant's ability to cross-examine the breath test operator to establish operator or machine error, a result now under attack under some states' interpretation of *Crawford*. The Court cannot conclude that the State need not produce the breath or blood test technicians for cross-examination and remain faithful to its guarantee of a fair trial in *Trombetta*, where as here, there is no preserved sample of the defendant's breath for him to test.

Since many state courts have apparently forgotten *Trombetta*'s reliance on the defendant's ability to cross-examine the breath test technician, this Court should grant certiorari to address this issue.

V. Cases and news stories contain numerous examples of incompetence, neglect, accident, and fraud, with respect to scientific evidence, which could only be fully uncovered with the aid of cross-examination

Unfortunately, the case law and news are replete with examples of negligence, incompetence, accident, and fraud in crime laboratories across the country. John F. Kelly & Phillip K. Wearne, *Tainting Evidence: Inside the Scandals at the FBI Crime Lab* (The Free Press 1998); Rod Ohira, *FBI Tip Prompts Audit of HPD Serology Lab*, Star Bulletin, September 9, 2000; *Scientist's Cases under Review After DNA Clears Man*, CNN.com, December 15, 2002; *When a Lab Gets It Wrong*, The Washington Post, June 15, 1997; Steve Mills and Maurice Possley, *State Crime Lab*

Fraud Charged, Chicago Tribune, January 14, 2001; Maurice Possley and Steve Mills, *Crime Lab Disorganized, Report Says*, Chicago Tribune, January 15, 2001; James Ewinger, *Lab Practices Questioned*, The Plain Dealer, August 18, 2000; Ruben Castaneda, *Drug Case Dropped After Ruling on Lab*, The Washington Post, November 23, 1999; *Hundreds of Drug Cases May Be in Jeopardy*, Dallas Morning News, July 19, 1996; U.S. Department of Justice, Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*, April 1997; John Solomon, *FBI Lab Problems, New Allegations Target DNA, Bullet Analysis at FBI Lab*, Associated Press, April 15, 2003; *Fed: Private Labs Fake Environmental Experiments, Jeopardize Enforcement*, Associated Press, January 22, 2003.

This list of news stories simply represents the tip of the iceberg. There is no monopoly on fraud, incompetence, negligence and accident in government or private laboratories. A rule that allows the breath and blood test technicians to testify by affidavit without cross-examination ignores the reality that in many cases the information on which such affidavits are based is flawed in some way and that the defendant is being denied an opportunity to develop and present a defense. This Court should grant certiorari to guarantee that if there are to be flaws in the process by which a defendant's conviction is obtained, the inability to examine the witnesses against him is not one of them.

CONCLUSION

For the reasons stated, this Court should grant Napier's Petition for a Writ of Certiorari.

Respectfully submitted,

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